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No. 454

In The Supreme Court of the United States

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL,
Appellants,

vs.

WILLIAM LOWE, DOING BUSINESS UNDER THE NAME OF THE CAPITOL HILL GIN COMPANY,
Appellee.

BRIEF OF APPELLANTS

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WILLIAM LOWE, DOING BUSINESS UNDER THE NAME OF THE CAPITOL HILL GIN COMPANY,
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BRIEF OF APPELLANT

The pertinent part of the law complained of as found in Section 5648, Compiled Oklahoma Statutes 1929 of the act passed in 1919, is as follows:

"The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time

at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

On April 9th, 1929, the appellee filed his bill in the United States Court for the Western District of Oklahoma, alleging the unconstitutionality of the above law, and praying for an injunction against the appellants, perpetually enjoining them from issuing a license to operate a gin under said authority. (Rec. P. 1).

The case was presented under an agreed statement of facts. (Rec. P. 21).

The final decree in injunction was issued June 22, 1929. (Rec. P. 23).

The Background of the Law Here Assailed Is Found In the History of the Co-operative Movement In the United States, and the Provision Here Challenged Has Been Specifically Sustained by the Courts.

The first steps in the direction of active cooperative effort were taken at the National meeting of the Grange in 1875, at which meeting, what is known as the "Roachdale principles" were adopted. This was the beginning of an effort of the farmers:

(a) To secure a fixed dividend of capital stock;

(b) For doing business with non-members, and

(c) For any remaining dividend to be apportioned on a patronage basis.

Mr. Nourse, in his work, "The Legal Status of Agricultural Co-Operation," gives a complete history of the movement, and in summarizing the effort made at the meeting of the Grange in 1875, concludes his summary with these words:

> "Profits to go, after payment of interest and depreciation, either to increase the capital or business of the association, or for any educational or provident purposes authorized by the association, and the remainder shall be divided among those who have purchased goods from this association during the preceding quarter

(to non-members one-half the proportion of members), in proportion to the amount of purchases during the quarter."

Perhaps the first law passed on the subject was by the State of Michigan in 1865, and was amended in 1875. This will be found on page 40 of Mr. Nourse's Work, and in section 12 of the law it is provided that:

"There shall be such distribution of the profits or earnings of such association among the workmen, purchasers, and stockholders, as shall be described by the by-laws, at such time therein prescribed, and as often at least as once in twelve months."

The movement seems to have grown with great rapidity, and culminated in 1911 by the passage of the Co-Operative Law of Wisconsin, and in his dissenting opinion in the Frost case, Mr. Justice Brandies said:

"Thirty-three States, at least, have enacted laws, providing for the formation of co-operative associations of the stock type. All of them permit a fixed dividend on capital stock, the doing of business for non-members, and the distribution of patronage dividends."

But it seems the Wisconsin law was taken as the type, and has been copied verbatim (or with light and non-essential changes) in Michigan, Minnesota, South Dakota, New York, Kansas, Wash-

ington and Massachusetts, in 1913, Virginia in 1914, Iowa, Wyoming, North Carolina, South Carolina and Oregon in 1915, Rhode Island in 1916, Kentucky in 1918, and Oklahoma in 1919. While the statute of Wisconsin of 1911 was used most widely as a pattern, yet it seems that Minnesota was the distinct pioneer in the field of co-operative legislation. The Wisconsin Law gives specific recognition to the fundamentals of the Roachdale movement, namely, limitation of capital holding, Democratic voting and patronage dividends, and this clause of the Wisconsin law is significant:

> "The directors, subject to revisions by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock not exceeding 6 per cent per annum, then setting aside not less than 10 per cent of the net profits for a reserve fund, until an amount has accumulated in said reserve fund, equal to 30 per cent, but when recommended by the directors and voted upon by a majority of the stockholders at an annual meeting or a special meeting for that purpose the same may be increased to 100 per cent of the paid-up capital stock, and 5 per cent thereof for an educational fund to be used in teaching co-operation, and the remainder of said net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employes, and one-half of such uniform dividend to non-shareholders on the

amount of their purchases, which may be credited to the account of such non-shareholders on account of capital stock of the association;"

And in the Co-Operative Law of Minnesota, as amended in October, 1914, the method of profit distribution was arranged in the following manner:

"The net profits of the business of this corporation shall be applied and divided among its shareholders at the end of each business year as follows:

A dividend of not to exceed 7 per cent per annum shall be paid upon the outstanding stock on the date of such dividend.

The remaining balance shall be divided among the shareholders of this corporation pro-rata to the amount of business each has furnished to the company during the year, in the form of furnishing to it the product or products in which it is dealing."

Thus, on examination of the various laws, it will be observed that there may be slight differences in the amount of dividend to be paid on the stock, the amount or per cent used for an educational fund, the per cent of the net profits set aside for reserve fund, but in all essential features they are the same.

This identical question was before the Supreme Court of Minnesota in October, 1917, in

which case the action was brought in the district court to restrain the Farmers Mercantile & Elevator Company, the defendant corporation, from distributing its earnings as patronage dividends, and to restrain it from distributing its dividends in any manner except as to the amount of stock held by the stockholders. The business of the company was the buying, selling, receiving, forwarding and handling of wheat, oats, barley, and other farm products, and also buying and selling coal and other fuel, all at Madison, its place of business. The first statute provided that the profits should be distributed in such manner as "shall be prescribed by the by-laws," but in 1914 this was changed, as above pointed out, to distribute the profits as patronage dividends. The Supreme Court pointed out that according to the provisions of the by-laws, 7 per cent was distributed to the stockholders without discrimination, and the remainder was paid over to such stockholders as had dealt with the company and thereby contributed to its earning power by the sale and delivery to it of their farm products and the purchase of the commodities held by it for sale to the trade, and in the proportion to the business each so contributed to the company.

The plaintiff owned one share of stock, but did not contribute to the business of the company by the sale of his products or otherwise, and after

the adoption of the by-laws, shared only in the seven per cent distribution, and did not share in the profits distributed as patronage dividends, and by this action he challenged the validity of the law, and insisted upon his right to an equal pro rata distribution of the earnings of the company. The lower court found the facts as stated, and held that the by-law was valid, the distribution of the earnings of the company as patronage dividends not a violation of any of the rights of the plaintiff, and rendered judgment accordingly. The syllabus of the case is as follows:

> "A co-operative association under section 6485, G. S. 1913, is authorized by the statute to provide by by-law for the distribution of profits and earnings in such proportion as the stockholders may deem just.
>
> "A by-law which discriminates within reasonable limits between stockholders who deal with the company, thereby increasing its earning power, and those who do not deal with it, HELD not violative of the rights of the stockholders thus discriminated against.
>
> "For several years the company made an equal pro rata distribution of its profits without discrimination; it is HELD, that the custom in this respect, though extending over several years, did not preclude the company from departing therefrom, or deprive it of the right to enact a by-law providing for a different dis-

tribution. No right of the non-assenting stockholders was thereby violated."

And in the body of the opinion it is said:

"The only question presented is whether the method of distributing the earnings of the company as fixed by the by-law violates any of the vested legal or equitable rights of plaintiff. We answer the question in the negative. A co-operative association such as the legislature had in mind in the enactment of the statute under which defendant was incorporated, has been defined to be a 'union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each.' *Finnegan v. Noerenberg,* 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. 552.

"The scheme of the corporation is the reciprocal co-operation by the members of the company for their mutual benefit, and in this respect is differentiated from corporations organized for general commercial purposes, or those wherein the pecuniary profits furnish the principal object of the enterprise. The distribution of profits is subject to regulation by the by-laws of the company, and the rights of all shareholders are controlled thereby. The language of the statute is that the 'profits or earnings of such association shall be distributed to those entitled thereto by its by-laws, and in proportions and at the times therein prescribed.' Such general authority as to profit distribu-

tions is not possessed by corporations formed for ordinary commercial purposes."

This case is found in Vol. 138, Minn. Reports, page 199, and reported in 164 N. W. 804, and is referred to by Mr. Nourse in his work on The Legal Status of Agricultural Co-Operation, on page 268 in these words:

> "The other great tenet of Roachdale co-operation, the patronage dividend, was attacked in *Mooney v. Farmers' Mercantile and Elevator Company* (138 Minn. 199, 164 N. W. 804 (1917) by a stockholder who claimed that earnings must be distributed uniformly according to the amount of stock held by each owner. The court ruled that this was not necessary in companies under the co-operative statute, although it was required in ordinary corporations."

The only possible distinction between the association in Oklahoma and that in Minnesota is that in Oklahoma, gins were made public utilities by statute, and in the Frost case they were considered as such, although the point was not decided and our own Supreme Court, in *Choctaw Cotton Oil Company et al v. Corporation Commission,* decided June 1, 1926, specifically said that they did not pass upon the question as to whether the legislature had such authority, but it said that if it had such authority, then it has authority under the doctrine of non-classification to divide operators of cotton gins into different classes and to

prescribe the method by which each class may obtain a corporation license.

Under our view of the law a thing is a public utility in law if it is a public utility in fact, and the declaratory statute of the legislature cannot and does not change the fact, but of course should be persuasive on the subject.

We incline to the view, as above stated, that gins in Oklahoma are public utilities, and surely if they are, the co-operative corporations in Minnesota are public utilities, because their business is the buying, selling, receiving, forwarding and handling of wheat, oats, barley and other farm products, and also buying and selling coal and other fuel, and do as much business with the public as a cotton gin in Oklahoma, and whether the legislature of Minnesota made them public utilities or not would not change the fact that to all intents and purposes they are public utilities even in a greater sense than cotton gins in Oklahoma, for the Minnesota corporation deals in all the products of the farm, and coal and other fuel used in the state.

Assuming that Section 5648 Provides a Different Method for Distribution of Net Profits Among Cotton Growers Patronizing a Cotton Gin Owned by a Co-operative Corporation, Is Such Classification Unconstitutional?

In the Frost case, Supreme Court Adv. Op. Mch. 1, 1929, stress was laid upon the fact that the proviso and amendment of 1925, permitting gins to be operated co-operatively to secure a cotton gin license by the mere presentation of a petition signed by one hundred citizens and taxpayers, did not limit either the stockholders or the beneficiaries to cotton growers. At page 250 of the opinion, Justice Sutherland, speaking for the court, says, with respect to a co-operative corporation organized under the 1919 Act:

> "Its members need not even be cotton growers. They may be—all or any of them —bankers or merchants or capitalists having no interest in the business, differing in any respect from that of the members of an ordinary corporation."

In view of other decisions by the Supreme Court of the United States, it appears to us that this was the underlying reason upon which the opinion of Justice Sutherland was based. This is true for the reason that in a number of other cases involving classification for legislative purposes, similar laws, limited to tobacco growers, cane growers and others engaged in agriculture, have been upheld. See *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102; *Owen County Burley Tobacco Society* v. *Brumback,* 107 S. W. 710; *Commonwealth* v. *Hodges,* 125 S. W. 692;

Dark Tobacco Growers Co-operative Association, et al v. *Dunn*, 266 S. W. 308; *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative Association*, United States Supreme Court Advance Opinions, March 1, 1928, page 292 (72 L. Ed); *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166.

We have cited the above cases in support of our statement, for the reason that the issues here involved, and the statute involved, Section 5648, C. O. S. 1921, which permits distribution of profits, is limited to cotton growers. No others whatsoever are permitted to enjoy the benefits, if any, of the distribution of surplus profits. Such a classification is supported by the decisions of all the courts of which we have any knowledge.

As was stated by Mr. Justice McReynolds, in the case of *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative M. Association*, supra:

> "The opinion generally accepted — and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95; 45 L. Ed. 102; 105,

21 Sup. Ct. Rep., 43; *Cox* v. *Texas*, 202 U. S. 446, 50 L. Ed. 1099, 26 Sup. Ct. Rep. 671. And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (NS.) 525, 34 Sup. Ct. Rep. 859; *Jones* v. *Union Guano Co.*, 264 U. S. 171, 68 L. Ed. 623, 44 Sup. Ct. Rep. 280. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen."

The general principles of classification for legislative purposes perhaps is as well stated in the case of *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, in an opinion by Justice Pitney, as it may be stated:

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection.

Rosenthal v. *New York,* 326 U. S. 260, 271, 57 L. Ed 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; *Patsone* v. *Pennsylvania,* 232 U. S. 128, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, 649, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co.* v. *Missouri,* 234 U. S. 199, 215, 58 L. Ed. 1276, 1283, 53 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep., 859; *Kookee Consol. Coke Co.* 1. *Taylor,* 234 U. S. 224, 227, 58 L. Ed. 1288, 34 Sup. Ct. Rep. 856; *Miller* v. *Wilson,* 236 U. S. 373, 385, 59 L. Ed. 628, 632, L. R. A. 1015F, 829, 35 Sup. Ct. Rep. 342.

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

As was stated by Justice McReynolds, in the Liberty Warehouse case, the general power of the states to legislate so as to meet a definitely threatened evil, even though such legislation may discriminate, has been affirmed many times by the Supreme Court of the United States.

The evil of combination cotton ginners and seed crushers, as well as cotton purchasers for the purpose of controlling the price of cotton seed and cotton, is set forth in the answer to the Bill in this case. The Legislature no doubt had that evil in mind at the time it passed the Act of 1919, and

the cotton growers certainly have had it in mind in the organization of co-operative gins throughout the State of Oklahoma for the purpose of engaging in the business of processing their own cotton for market where they may save their seed or sell it if they wish and dispose of their cotton as they may see fit.

In a recent case decided by the Supreme Court of the United States, *People of the State of New York* v. *Zimmerman,* Sup. Ct. Rep. Advance Opinions, Dec. 15, 1928, page 61, in an opinion by Mr. Justice Vandeventer, he points out the rule of classification applicable to legislation designed to suppress a particular evil. The opinion cites the following cases in support of such classification:

Patsone v. *Pennsylvania,* 232 U. S. 138, 58 L. Ed. 539.

Lindsley v. *National Carbonic Gas Co.,* 220 U. S. 61, 55 L. Ed. 369.

Miller v. *Wilson,* 236 U. S. 373, 59 L. Ed. 628.

Radice v. *New York,* 264 U. S. 292, 68 L. Ed 690.

American Sugar Ref. Co. v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

Arkansas Natural Gas Co. v. *Railroad Commission,* 261 U. S. 379, 67 L. Ed. 705.

Orient Ins. Co. v. *Daggs,* 172 U. S., 557 43 L. Ed 552.

Tullis v. Lake Erie & Western R. R. Co., 175, U. S. 348, 44 L. Ed. 192.

Petit v. *Minn.,* 177 U. S. 164, 44 L. Ed. 716.

Williams v. *Fears,* 179 U. S. 270, 45 L. Ed. 186.

Quaker City Cab Co. v. *Pennsylvania,* (Decided May 28, 1928) 48 Sup. Ct. Rep. 553, 72 L. Ed. ——.

Perhaps the leading case of this country involving the rights of the holder of a license or franchise against competition, is the case of *Charles River Bridge Co.* v. *Warren Bridge, et al,* 11 Pet. 420. In that case the Charles River Bridge Company held a franchise to operate a toll bridge in the State of Massachusetts. Thereafter the state granted a competitive franchise, by the terms and provisions of which the last bridge authorized became a free bridge in the course of the years, which destroyed the business of the Charles River Bridge Company. Chief Justice Taney pointed out at considerable length the power of the state to grant franchises and to exercise the right of police power, and that the power may be so used as to destroy the valuable franchise formerly granted to another corporation. The court, in dealing with the rights of competitive concerns holding franchises, said:

"The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchise granted to that corporation have been revoked by the Legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all of the franchises and rights of property enumerated in the charter and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury or in any degree affected their right of property if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated that contract by the erection of the Warren bridge."

See also:

Beinville Water Supply Co. v. *Mobile,* 186 U. S. 212.

Long Island Water Supply Co. v. *Brooklyn,* 166 U. S. 685.

Bartlesville Electric & Power Co. v. *Bartlesville Int. Ry. Co.,* 26 Okla. 453.

Choctaw Cotton Oil Co., et al, v. *Corporation Commission of Oklahoma, et al,* 247 Pac. 390.

In our opinion, the Supreme Court of the State of Oklahoma, in the case of *Choctaw Cotton Oil Co. et al* v. *Corporation Commission of Oklahoma, et al,* just cited, which involved the co-operative amendment to the Cotton Gin Act, particularly co-operatives, to secure license by the presentation of a petition instead of by showing necessity, has clearly passed upon the rights of cotton ginners with respect to competitive conditions. The Court said:

> "The contention being that the foregoing proviso denies petitioners, of equal protection under the law and takes their property without due process of law, the question necessarily arises, what property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitutions; hence, the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

In this connection it should be remembered that Section 32 of Art. 2 of the Constitution of the State of Oklahoma, prohibits the granting of perpetuities or monopolies by providing:

> "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed."

Section 51 of Art. 5 then provides:

> "The Legislature shall pass no law granting to any association, corporation or individual any exclusive rights, privileges or immunities within this State."

Mr. Pond on Public Utilities (Third Edition), Sec. 203, lays down the same principle, in the following language:

> "Impairment of Franchise Rights by Competition Not Prohibited. That the effect of contracting with or creating another municipal public utility does not violate the contract rights or interests protected by the Constitution where the former company did not secure an exclusive right or franchise, is well expressed in the case of *Revere Water Co.* v. *Winthrop,* 192 Mass. 455, 78 N. E. 497, 207 U. S. 604, 53 L. Ed. 360, 28 Sup. Ct 253, decided in 1906, in the following language:
>
> 'This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served

by conferring such authority was for the Legislature to determine. It is manifest that if any independent system might be thus established, the defendant's property would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under Statutes 1882, page 101, chapter 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Nor is legislation of this nature an appropriation of private property for a public use without due process of law under the Fourteenth Amendment to the Federal Constitution."

The decisions of the courts of this country upon the question of classification for legislative purposes, are so numerous that it would be impossible to cite or call attention to them all. A consideration, however, of the leading cases discloses the following citations upholding similar, if not, almost the same legislation as that undertaken in this case.

Fidelity Mutual Life Asso. v. *Mettler,* 185 U. S. 308, 46 L. Ed 992.

Hayes v. *State of Missouri,* 120 U. S. 82, 30 L. Ed. 581.

Jessie Norton Torrance Magoun v. *Ill. Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.

Missouri, Pacific Ry. Co. v. *Mackey,* 127 U. S. 205, 32 L. Ed. 106.

C. B. & Q. Ry. Co. v. *Iowa,* 94 U. S. 155, 25 L. Ed. 94.

Thomas Watson, et al. v. *Joseph Nevin,* 128 U. S. 578, 32 L. Ed. 544.

Joslyn Mfg. Co. v. *Providence,* 262 U. S. 668.

Crescent Cotton Oil Co. v. *Mississippi,* 257 U. S. 129, 66 L. Ed. 166.

C. R. I. & P. Ry. Co. v. *D. J. Perry,* 259 U. S. 548, 66 L. Ed. 1056.

Middleton v. *Texas Power & Light Co.,* 249 U. S. 152.

Miller v. *Wilson,* 236 U. S. 373, 59 L. Ed. 628.

Citizens Tel. Co. v. *Fuller,* 229 U. S. 327, 57 L. Ed. 1212.

American Sugar Ref. Co. v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

German Alliance Ins. Co. v. *Lewis,* 233 U. S. 389, 58 L. Ed. 1011.

Northwestern Mutual Life Ins. Co. v. *Wisconsin,* 247 U. S. 133, 62 L. Ed. 1035.

Sunday Lake Iron Co. v. *Township of Wakefield,* 247 U. S. 350, 62 L. Ed. 1154.

Omaechevarria v. *Idaho,* 246 U. S. 343, 62 L. Ed. 769.

Granger v. *Douglas Park Jockey Club*, 148 Fed. 513:

Ex Parte Christinson, 43 Fed. 243.

Stebbins v. *Riley*, 268 U. S. 137, 69 L. Ed. 885.

Owen County Burley Tob. Soc. v. *Brumback*, 107 S. W. 710.

Commonwealth v. *Hodges*, 125 S. W. 692.
Dark Tob. Growers Asso. v. *Dunn*, 266 S. W. 308.

Complainant Has Nowhere Shown That the Enforcement of the Challenged Statute Would Deprive Him—Not Another—of Some Right Arising Under the Fourteenth Amendment to the Constitution of the United States Properly Asserted Below.

Southern R. R. Co. v. *King*, 217 U. S. 524, 54 L. Ed. 868.

Standard Stock Food Co. v. *Wright*, 225 U. S. 540, 56 L. Ed. 1197.

Hendrick v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385.

Jeffry Mfg. Co. v. *Blagg*, 235 U. S. 571, 59 L. Ed. 364.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Tyler v. *Registration Ct. Judges*, 179 U. S. 405, 45 L. Ed. 252.

Turpin v. *Lemon*, 187 U. S. 51, 47 L. Ed. 70.

Hooker v. *Burr*, 194 U. S. 415, 48 L. Ed. 1046.

New York ex rel Hatch v. *Reardon*, 204 U. S. 152, 51 L. Ed. 415.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-op. Assn.*, 72 L. Ed. 294.

Rosenthal v. *New York*, 226 U. S. 260, 57 L. Ed. 212.

Clark v. *Kansas City*, 176 U. S. 114, 44 L. Ed. 392.

William v. *Walsh*, 222 U. S. 415, 56 L. Ed. 253.

M. K. & T. R. R. Co. of Texas v. *Cade*, 233 U. S. 642, 58 L. Ed. 1135.

Thos. Cusack Co. v. *Chicago*, 242 U. S. 526, 61 L. Ed. 472.

Mallinckrodt Chem. Wks. v. *Missouri*, 238 U. S. 41, 59 L. Ed. 1192.

Choctaw Cot. Oil Co. v. *Corp. Com. of Okla.*, 247 Pac. 390.

Lee v. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106.

Aluminum Co. v. *Ramsey*, 222 U. S. 251 56 L. Ed. 185.

Murphy v. *California*, 225 U. S. 623, 56 L. Ed. 1229.

Darnell v. Indiana, 226 U. S. 390, 57 L. Ed. 267.

Interstate Busses Corp. v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 71 L. Ed. 530.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 545, 58 L. Ed. 719.

In the case of *Southern R. R. Co.* v *King*, 217 U. S. 524, 54 L. Ed. 868, supra, the court said:

> "It is a setted law of this court that one who would strike down a state statute as violative of the Federal Constitution, must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution."

Continuing the discussion, the Court said with respect to the rights asserted by appellant:

> "The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mail and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. • • • • In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer

set up no legal defense and that the demurrer thereto was properly sustained."

In the case of *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 56 L. Ed. 1197, supra, the court said:

> "If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant 'sells to more than 800 dealers in the State of Iowa, besides a very large number of customers, who buy direct from your orator or through its agents' and that it has been enabled to sell in the State of Iowa during the past year and for a number of years preceding, a quantity of its goods in an amount exceeding $40,000.00 per annum. The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution'." (Citing numerous decisions of this court as well as of other courts.)

In the case of *Hendricks* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385, the court said:

> "If the statute is otherwise valid, the alleged discrimination against residents of the

District of Columbia is not adequate grounds for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and unauthoritative ruling by the courts of the State, we will not assume that, upon a proper showing, this will be denied. The record fails to disclose that Hendricks had complied with the laws in force within the District of Columbia, in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisite to a limited use of the highways without cost by residents of other states under the plain terms of Section 140 A. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

In the case of *Jeffery Mfg. Co.* v. *Blagg*, 235 U. S. 571, 59 L. Ed. 364, the court said:

"Much of the argument is based upon the supposed wrongs of the employe, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employe in a shop with five employes with those having less. No employe is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well settled rule of this Court that it only hears objections to the constitutionality of laws from

those who are themselves affected by its alleged unconstitutionality in the feature complained of."

In the case of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 66 L. Ed. 239, supra, the court said:

> "Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage."

In the case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assn.,* 72 L. Ed. 294, supra, the court said:

> "In order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below." (Citing cases supra and others.)

In the case of *Hooker* v. *Burr,* 194 U. S. 415, 48 L. Ed. 1046, supra, the court said:

> "We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler* v. *Registration Judges,* 179 U. S. 405, 45 L. Ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon,* 187 U. S. 51, 47 L. Ed. 70, 23 Sup. Ct. Rep.

20. If, instead of showing any injury, plaintiff shows that he cannot possibly be injured, he cannot, of course ask the interference of the court."

In the case of *Clark* v. *Kansas City,* 176 U. S. 114, 44 L. Ed. 396, the court said:

> "Of the discrimination between owners of agricultural lands, the Supreme Court of Kansas said the defendants in error cannot be heard to complain. Their lands are not agricultural lands, at least they do not allege them to be such lands; but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portion are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kinds of lands, and they cannot therefore, be heard to complain on that score."

In the case of *Williams* v. *Walsh,* 222 U. S. 415 56 L. Ed. 253, the court said:

> "There is another answer to the contention. The law cannot be declared invalid at the instance of one not affected by it, and as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder."

In the case of *Missouri, Kansas & Texas Railway Company of Texas* v. *Cade,* 233 U. S. 642, 58 L. Ed. 1135, supra, the court said:

"So far as the present attack is founded upon the commerce clause and the act to regulate commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act in this respect is repugnant to the Constitution and Laws of the United States." Citing numerous decisions of this and other courts.

In the case of *Interstate Busses Corp* v. *Holyoke St. Ry. Co.,* 273 U. S. 45, 71 L. Ed. 530, supra, the court said:

"The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 545, 58 L. Ed 719, supra, the court said:

"We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution, must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him and so operates as to

deprive him of rights protected by the Federal Constitution. *Southern R. Co.* v. *King,* 217 U. S. 524, 54 L. Ed. 868, 30 Sup. Ct. Rep. 594."

In the case of *Choctaw Cotton Oil Co., et al* v. *Corporation Commission of Oklahoma, et al,* 247 Pac. 390, the court said:

> "The contention being that the foregoing proviso denies petitioners equal protection under the law and takes their property without due process of law, the question necessarily arises: What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What right of any kind could the licensing of another gin affect: nor prevent the free operation of their gins. The only right which could be affected by such a license is the right of petitioners to operate their gin without competition. A right which is not secured to them either by the State or Federal Constitution; hence, the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

Applying this principle to the case now before the court, nowhere in the record is it claimed by appellant that he has been denied anything whatsoever at the hands of the Corporation Commission of the State of Oklahoma under the statute complained of. As a matter of fact, he himself will not know whether he suffers as a result of

the law complained of until at least a reasonable time. He holds at the present time a cotton gin license authorizing him to operate his gins at Capitol Hill and Wheatland. He has not even applied to the Corporation Commission for relief from the condition complained of. He is not a patron himself of either of the gins to be operated, and therefore as a patron entitled to complain as to service, has no standing whatsoever before a court, and particularly no standing to complain of constitutional infringements of his rights as an operator of a cotton gin, left free to operate at his will, subject to regulation, except that he fears competition against which no constitutional provision protects him.

Moreover, permit us to observe here that it is a fundamental principle of equity that an injunction which results in greater loss than that which will be protected by its granting, will not be granted. The farmers of the State of Oklahoma have invested $2,000,000.00 in cotton ginning facilities under this law. Complainant has invested probably $40,000.00 or $50,000.00. Assuming that each stockholder in a co-operative gin owns $100.00 worth of stock, then there would be 20,000 stockholders and farmers affected by the striking down of this law.

It will be observed:

1. That 23 per cent must be earned before there can be what is called a patronage dividend. The Corporation Commission has the power to fix a gin rate, and the probabilities are, and the presumption is that they would not fix a rate so high that an excess of 23 per cent would be earned.

2. It will be noted further that the earnings and profits thus apportioned as patronage dividends do not come from ginning, but from the amount of the products sold to the corporation and the amount of purchases by the corporation from its members.

3. It will be observed further that such earnings and profits in excess of the 23 per cent may be apportioned in part to non-members upon the amount of their purchases or sales if the by-laws so provide. Since there is no allegation in the petition that the by-laws of this corporation so provide, it must be assumed that the by-laws do not so provide, and therefore this feature is eliminated from consideration.

4. It is contended that this patronage dividend is a rebate, and that it is a privilege denied to the plaintiff. We observe, first, that there is no law in the State of Oklahoma against rebates;

that they were permissible under the common law, and our state has not legislated against them.

We observe, secondly, that this is not a rebate as embraced within any definition of the word any time heretofore used.

The Supreme Court of Wyoming, in 228 Pac., page 632, had occasion to consider the question of the cancellation of the license of an agent for giving or selling stock as an inducement to take insurance. It was there contended that the stock so given was a rebate in fact, as it is here alleged that a patronage dividend amounts to a rebate. The Supreme Court of Wyoming said, in the second syllabus of the case:

> 1. Insurance commissioner cannot cancel license of agent for giving or selling stock as an inducement to take insurance.
>
> Under Comp. St. 1920, sec. 5235, forbidding rebates, and giving or selling stocks, etc., as an inducement to insurance, and section 5236, relative to rebates, giving or selling stock as an inducement to take insurance, did not authorize the insurance commissioner to cancel agent's license, under section 5237, authorizing a cancellation of his license on evidence of 'such rebate.'
>
> 2. Words & Phrases—"Rebate" defined.
>
> The word 'rebate' is defined as an allowance by way of discount or drawback; a de-

duction from a gross amount; deduction; abatement; remission or payment back, as, a rebate of interest for immediate payment; a rebate of freight charges; discount; the abatement of interest in consequence of prompt payment; an allowance by way of discount or drawback; deductions from stipulated premiums allowed in pursuance of antecedent contract (citing Words and Phrases, First Series, Rebate).

3. Statute providing for revocation of agent's license to be strictly construed.

Comp. St. 1920, sec. 5237, penalizing an insurance agent for violation of statutes by revoking his license and prohibiting transaction of business by him for one year, is a penal statute, and must be strictly construed.

4. Mandamus—should not be denied to vacate order cancelling insurance agent's license because of expiration of license.

Though an insurance agent's license, wrongfully revoked, would since have expired, if not revoked, mandamus to vacate revocation should not be denied on the ground that it would be altogether ineffectual, where the revocation, if allowed to stand, would continue the disability of the agent for period which might not have expired."

The Supreme Court of Massachusetts, in the case of *Hamor* v. *Eastern R. R. Co.*, 133 Mass. 315-20, said:

"Rebate of interest is a discount of interest, or money not yet due and payable. It is not a payment back of interest due which has been paid."

In the Wyoming case, *supra,* the court said on page 634:

"The relator's alleged offense of selling or offering to sell stock as an inducement to the purchase of insurance is certainly not a 'rebate of premium payable on the policy,' as that phrase or the word 'rebate' is usually understood; nor is it technically a rebate of anything. The word 'rebate' is defined as follows: By the Century Dictionary as meaning 'an allowance by way of discount or drawback; a deduction from a gross amount.' In Webster's New International Dictionary: 'Deduction; abatement, remission or payment back, as, a rebate of interest for immediate payment; a rebate of freight charges.' In Bouvier's Law Dictionary (Rawle's 3d Rev.): 'Discount; the abatement of interest in consequence of prompt payment. An allowance by way of discount or draw back.' In 7 Words & Phrases, First Series, citing State v. Ins. Co., 38 La. Ann., 465, 467, it is said that rebates, in insurance, or deductions from stipulated premiums allowed in pursuance of antecedent contract. And that definition is accepted in the case of *Commissioner* v. *Life Ins. Co.,* 159 Ala. 533, 49 South. 234, where, after referring to it the court said, concerning the phrase, 'rebate of premium payable on the policy' used in a statute similar in that respect to our section 5235.

It is also elsewhere defined as a 'drawback' and 'abatement.' Waiving other considerations possible and leading to the same result, it is too apparent for doubt that the share system created bears no relation to a rebate for the obvious reason that the policy holder must afford, and does, if he secures the share — provided, the consideration for it by particular services to be performed—services of evident value and utility to the safe conduct of the business of the company."

We observe further that there is little probability, and no certainty that any member of this corporation will receive even a patronage dividend, and even if he does, it certainly would not injure the plaintiff in this case. Both parties to this action are subject to the Corporation Commission and its rules. They must gin cotton for whoever brings it, and for such ginning, each customer must be charged exactly the same rate. The plaintiff in this case will gin at the rate fixed by the Commission, and the customer will pay the same price to him as it will pay to the defendant. There is no difference in rate.

Respectfully submitted,

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Receipt is acknowledged of a copy of the above brief this the 4th day of April, 1930.

RAINEY, FLYNN, GREEN AND ANDERSON.